Jobsite Safety Responsibility Litigation Lessons Learned

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Course Learning Objectives

- Become familiar with site safety litigation addressing legal principles affecting contracts and construction projects
- List the different *power types* that exist in business and why you should care
- Learn site safety risk management issues and techniques based on lessons learned from recent case law
- Integrate leaderships techniques to improve safety
- Understand how potential defenses available to parties in site safety litigation may be used for or used against you
- Acquire ideas and strategies for allocating and addressing risk through contract language and actions in the field in light of reported court decisions concerning safety responsibility

Project Owners

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Owner Responsibility

- Once the project owner has executed a contract with its independent contractor delegating site safety responsibility to that firm
  - the owner generally has no legal liability for injuries to the employees of the independent contractors **unless**
    - the owner asserts some control over the means, methods and procedures of the contractor's work or takes some action at the project that causes or contributes to an injury

- There are exceptions to the general rule, including where there is:
  - (1) a non-delegable duty;
  - (2) an inherently or intrinsically dangerous activity; or
  - (3) negligent exercise or retention of control over the work by the owner

Owner Responsibility (cont)

- Merely retaining the right to stop, inspect or approve work is generally not enough to create owner liability

- Instead, retention of control by the owner must be so significant that the contractor cannot freely choose and exercise its means, methods and procedures as it deems fit

"You do not lead by hitting people over the head...

that's assault, not leadership."

President Dwight D. Eisenhower

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Types of Power

Reward power	*They can give you one*
Coercive power	*They can cause pain*
Reverent power	*They inspire you*
Legitimate power	*Power by election or behavior*
Expert power	*They impress you with intellect*
Informational power	*Have institutional knowledge*

Owner Not Liable for Independent Kr's Employee's Injuries

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- A project owner, Lafayette College, entered into a construction management (CM) agreement with a GC to renovate a building; that firm subcontracted the renovation work to other contractors, one of whom performed the roofing work
- An employee of the roofer climbed scaffolding that had been installed by a masonry subcontractor and fell from that scaffolding, suffering a serious injury; the employee sued the CM/GC as well as the masonry subcontractor and the college — alleging that all were negligent
- The Supreme Court of Pennsylvania held that although the college exercised some authority regarding safety, and regulated access to, and use of, certain areas of the premises, this conduct did not constitute the type of control that would subject it to liability since it **did not retain control over the actions of the independent**
  - *Beil v. Telesis Construction, Inc.*, 11 a.3D 456 (PA Supreme Ct. 2011).

Hirer of Independent Kr Implicitly Delegates Safety Responsibility

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- General rule is that employees of independent Kr injured in workplace cannot sue party that hired Kr
  - This is true even when the party that hired Kr failed to comply with statutorily imposed workplace safety requirements – so long as it didn't affirmatively contribute to the accident
- US Air hired independent Kr to maintain luggage conveyor at SFO
  - It didn't direct the work or have its own employees participate in the work
  - Conveyor lacked safety guards
  - While inspecting conveyor, one of the Kr's employees arm caught
    - After workers comp insurer paid, it sued US Air – claiming airline caused the injury
- Court held: Summary judgment properly granted to US Air because it was permitted to delegate to the contractor its duty, if any, to ensure workplace safety
  - *Seabright Ins. V. US Air, 258 P.3d 737 (Cal. 2011)*. (See next slide for explanation).

Delegates Safety Responsibility (cont)

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- California case precedent cited by the court establishes that the hirer of an independent Kr "presumptively delegates to that Kr its tort law duty to provide a safe workplace for the Kr's employees"
- Court says US Air owed its own employees a duty to provide a safe workplace and could not delegate that duty to the independent Kr
  - But that duty does not extend to the independent Kr's employees
- Logic for the holding:
  - "… In light of the limitation that workers' compensation places on the independent Kr's liability … it would be unfair to permit the injured employee to obtain full tort damages from the *hirer* of the independent Kr. This inequity would be even greater when … the independent Kr had sole control over the means of performing the work."

Design Professionals

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Design Professional Jobsite Responsibility

- Design professionals and professional consultants also need to take precautions against accepting responsibility for the safety of anyone other than their own employees
- Numerous court decisions have addressed the question of whether a firm such as an architect, engineer or CM has liability for someone else's employee despite not being directly or even indirectly responsible for causing the injuries
- The key questions addressed by courts are whether:
  - The contract between the consultant and the project owner established consultant safety responsibilities
  - Did the consultant do anything in the field during construction to take on responsibility site safety despite contracts stating otherwise

Design Professional Jobsite Responsibility

- If the contract language clearly states that the consultant has no responsibility for project site safety and the contractor is solely responsible (e.g., AIA B 101-2007, § 3.6.1.2 and AIA A 201-2007, § 11.1.4), the court will not stop there with its analysis

Design Professional Site Safety Basics

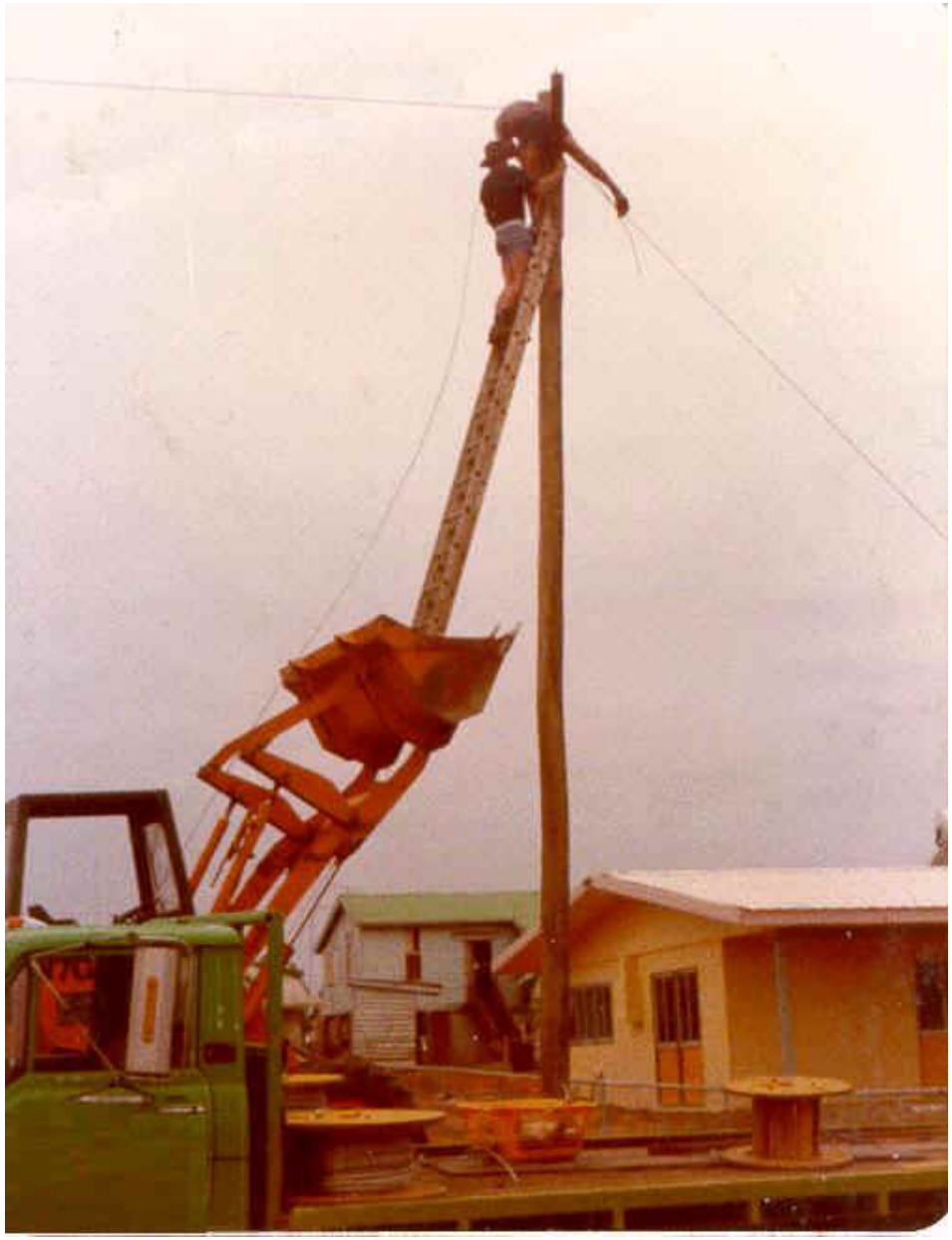
- Design Professional's (DP's) contract with the owner should expressly state the limitations of DP's role concerning jobsite safety responsibility
- In-field activities must mirror whatever limitations are contained in the contract

Site Safety
The EJCDC Contract

- EJCDC E-500, Exhibit A, §A1.05.C addresses the issue as follows:
  - "Engineer shall not be responsible for the acts or omissions of any Contractor, Subcontractor or Supplier, or other individuals or entities performing or furnishing any of the Work, for safety or security at the Site, or for safety precautions and programs incident to Contractor's Work, during the Construction Phase or otherwise. Engineer shall not be responsible for the failure of any Contractor to perform or furnish the Work in accordance with the Contract Documents."

Site Safety
The EJCDC Approach

- EJCDC E-500 (2008), Article 6.01.H, provides:
  - "Engineer shall not at any time supervise, direct, or have control over any contractor's work, nor shall Engineer have authority over or responsibility for the means, methods, techniques, sequences, or procedures of construction selected or used by any contractor or the safety precautions and programs incident thereto, for security or safety at the Site, for safety precautions and programs incident to the Contractor's work in progress, nor for any failure of Contractor to comply with Laws and Regulations applicable to Contractor's furnishing and performing the Work."



Site Safety
Clarify Owner and Contractor Responsibilities

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- "Site Safety. Owner agrees that, in accordance with generally accepted construction practices, each Contractor or Subcontractor not retained by DP shall be solely and completely responsible for working conditions on the job site, including safety of all persons and property during the performance of their work. This obligation shall include providing any and all safety equipment or articles necessary for employee personal protection and compliance with OSHA regulations. These requirements will apply continuously on the job site and will not be limited to normal working hours. Any monitoring of the Contractor's or Subcontractor's procedures conducted by DP in this role is not intended to include review of the adequacy of the Contractor's or Subcontractor's safety measures in, on, adjacent to, or near the construction site."

Site Safety (cont)
AIA B101 vs. ConsensusDOCS

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- AIA B101-2007, Sec. 3.6.1.1 provides:
  - "[Architect] … shall not have control over or charge of, and shall not be responsible for, acts or omissions of the Contractor …."

- ConsensusDOCS 240, sec. 3.2.8.4 states:

  - "However, if the Architect/Engineer has actual knowledge of safety violations, the Architect/Engineer shall give prompt written notice to the Owner"

- This ConsensusDOCS provision is troublesome because not all states require the DP to provide notice to its client, or take other action, when it has actual knowledge of safety violations

  - But this ConsensusDOCS makes *Carvalho vs. Toll Brothers* a universal requirement

Site Safety (cont)

- When is the Consultant liable to third parties for injuries on a construction project?
  - Courts first look to contract to see if it imposes duty or if it might even contain language expressly disavowing site safety responsibility
  - Even if contract does not create duty, the Consultant could assume duty by its actions on the jobsite
    - did Consultant tell contractor what to do?
    - did Consultant see dangerous conditions and ignore them? (New Jersey standard)

Resident Engineer Liable

- Engineer held liable for worker's death in trench collapse
  - Resident engineer admitted he knew of unsafe conditions, having seen trench collapse before
- Contract language assigned safety responsibility to contractor
- Engineer had duty to take action when confronted with dangerous condition with which he has actual knowledge
  - *Carvalho v. Toll Brothers 278 NJ Super. 451(1995)*

General Rule for Consultants

- The general rule, according to Pennsylvania court:

  "The [Consultant's] basic duty is to see that his employer gets a finished product which is structurally sound and which conforms to the specifications and standards."

  "Any duty that the [Consultant] may have involving safety procedures of the contract must have been specifically assumed by the contract or must have arisen by actions outside the contract."

  "In determining whether the [Consultant's] contractual duty to supervise the construction includes the safety practices on the jobsite, the [A/E] may intentionally, or impliedly by his actions, bring the responsibility for safety within his duty of supervision."

  – *(Herczeg v. Hampton Township and Bankson Engineers (Penna. 2001)).*

Factors Considered by Courts

- Actual supervision and control of the work by architect/engineer (A/E)
- Retention of the right to supervise and control
- Constant participation in ongoing construction activities
- Supervision and coordination of subcontractors
- Assumption of responsibility for safety practices
- Authority to issue change orders; and the right to stop the work”

Architect Liable to an Airport Maintenance Person Electrocuted While Working on an Electric Switchgear Box Without Warning Labels

- Employee of airport was electrocuted while attempting to repair an electrical transformer that lacked required wiring diagrams and warning signs.

- The family of the deceased filed suit against the owner of the hotel as well as the architect that designed it, the consultant that did the electrical engineering services, the GC, and the electrical subcontractor, alleging negligence, gross negligence and breach of warranty

  – *LeBlanc v. Logan Hilton, 974 N.E. 2d 34 (Mass. 2012)*

Architect Liable to an Airport Maintenance Person Electrocuted (cont)

- The hotel filed cross claims against the architect and the electrical engineer seeking indemnification and contribution

- The Supreme Court of Massachusetts held that claims for contribution were proper because the consultant owed an independent duty of care to the electrician to comply with its contractual obligations to the project owner to get the contractor to provide proper warning labels on the switchgear

Architect Liable to an Airport Maintenance Person Electrocuted (cont)

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- "Failure to notify Hilton of the manufacturer's failure to install the warning signage constituted a contractual breach that posed a "field of risk for third parties likely to come into contact with the switchgear, and summary judgment should not have been granted since there was an issue of fact of causal negligence to be decided by trial"

- The first point the court made was that:
  - "It is settled that a claim in tort may arise from a contractual relationship … and may be available to persons who are not parties to the contract…."

Motorist Can't Sue A/E for Negligent Road Design Beyond Statute of Repose for Real Property Improvements

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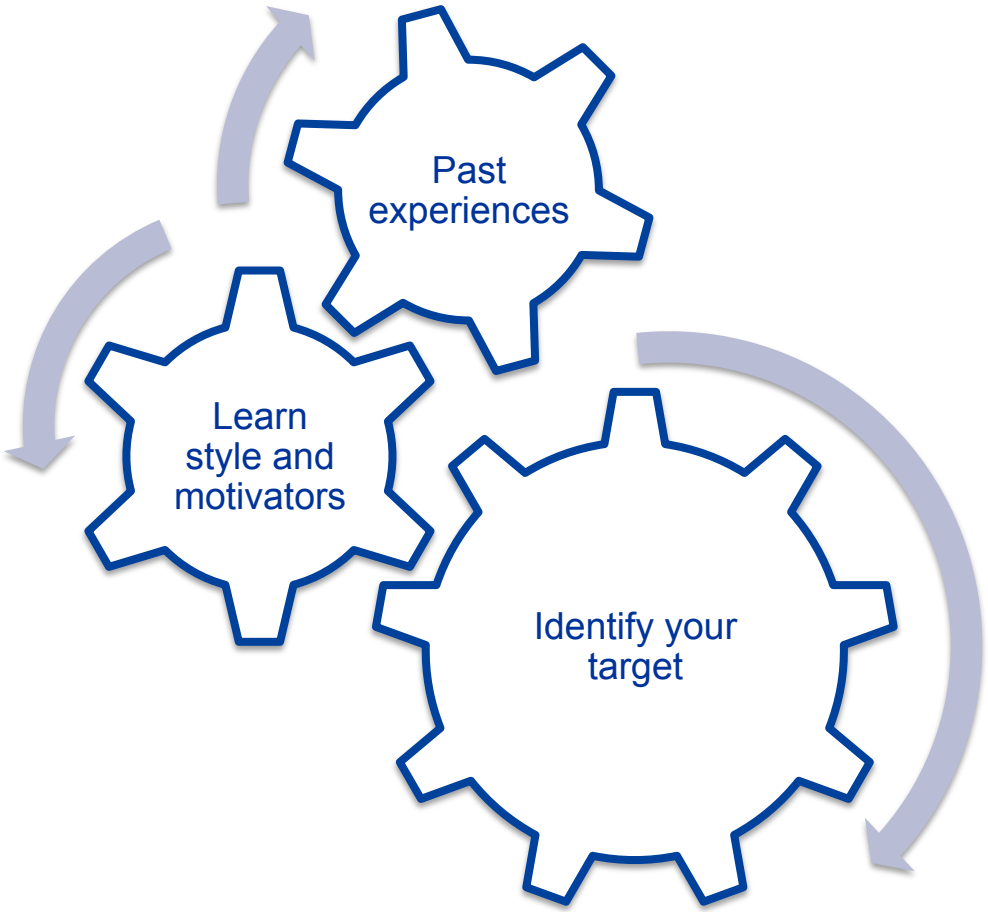
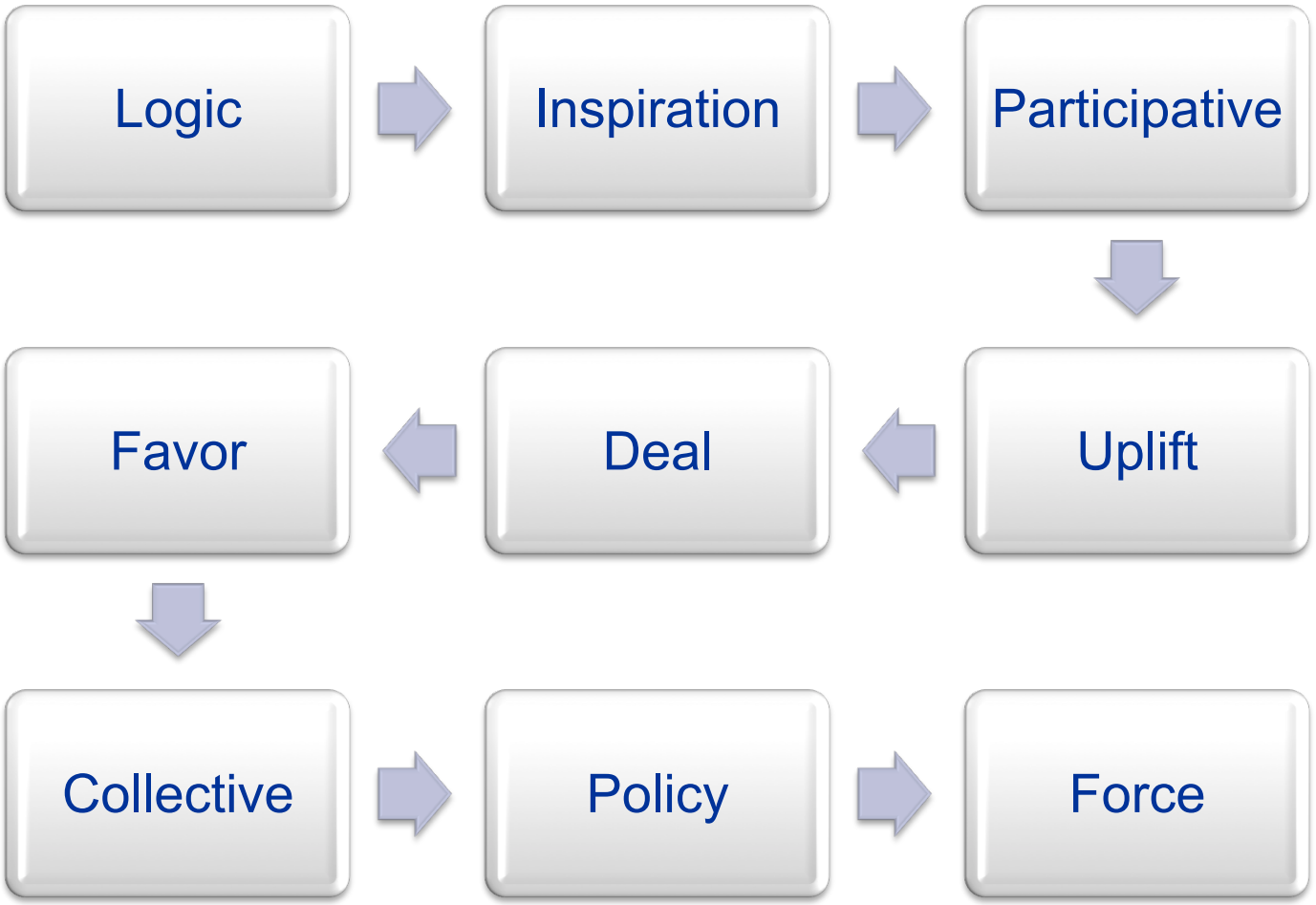
- Where design services performed eight years before drunk driving accident, Court held eight-year statute of repose barred claim
- Issue was whether highway design and construction was "improvement to real property" as that term is used in state statute
- The Court found:
  - "Although it is true that no one actually lives on the road in order to "occupy" it, "countless vehicles traverse the road each day, and such daily public 'occupation' in this manner would lead to the discovery of any such flaw within the reasonable time frame as a design flaw in a building."
  - Therefore, the statute or repose was applied

    - *Feldman v. Arcadis US, 728 SE 2d 792 (GA 2012)*

How to Influence



Influencing Techniques



Construction Managers

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CM Agency Not Responsible for Kr Injury

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- Employee of a contractor sustained eye injury when a clamp he was loosing on a clogged concrete pouring pipe exploded in his face
- Sued the Agency CM who was in contract with the project owner and had no privity of contract with the contractor
- CM not liable since had no supervisory control or authority over the work, did not create the dangerous condition and did not have actual or constructive knowledge of the condition
  - CM did not provide labor or material to the contractor and did not direct employees of contractor in how to perform
- Court stated the CM contract "specifically withheld from CM any authority to control either the contractors' work methods or safety programs"

  - *Shawn Adair v. BBL, 809 NYS2d 592 (2006).*

CM Not Liable for Sub's Injuries

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- Employee of sub injured when pressurized concrete delivery pipe whipped around and caused him to fall
- Sued CM for negligent supervision of the work
- Held CM should have been granted summary judgment because where a claim is based on defects or dangers in Sub's means, methods or materials, liability cannot be imposed on CM absent evidence it exercised supervisory control
  - To do that: "it must be demonstrated that the contractor controlled the manner in which the plaintiff performed his work."

CM Not Liable for Sub's Injuries (cont)

- CM had employed a firm named Site Safety, Inc. to comply with the NY Administrative Code requirements but its role was limited to performing safety related tasks and didn't have authority to control manner in which work was performed – and did not actually take actions to control the work

- Fact that CM and Site Safety, Inc. both had authority to stop the work for safety reasons is not sufficient evidence of supervision and control of the sub's work

  – *Hughes v. Tishman Construction Corp., 836 NYS 2d 86 (2007)*

CM Not Responsible for Jobsite Safety

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- In *Hunt Construction Group, Inc. v. Garrett* (964 N.E. 2d 222, Indiana 2012), an employee of a concrete contractor (Baker Concrete Construction, Inc.) was injured in a workplace during construction of a stadium
- While removing forming material from concrete, one of her co-workers dropped a piece of wood that struck her on her head and hand; although employed by Baker, she sought to recover from the CM (Hunt) alleging that the CM had a legal duty of care for jobsite-employee safety
- The CM's only contract was with the project owner; it had no contractual relationship with Baker Concrete or any other contractors on the project

CM Not Responsible for Jobsite Safety (cont)

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- In deciding whether the construction manager (CM) owes a duty, the court explained that it focuses on determining "whether (1) such a duty was imposed upon the CM by a contract to which it was a party; and (2) the CM assumed such a duty, either gratuitously or voluntarily"

- Court found that no legal duty of care for jobsite-employee safety was imposed upon the CM by contract

- "First, the CM contract itself did not specify that the CM had any responsibility for safety whatsoever. Second, counterpart construction contracts signed by the contractors and subcontractors indicated that they had responsibility for project safety and the safety of their employees. Third, those contracts expressly disclaimed any direct or indirect responsibility on the part of the CM for project safety."

CM Not Responsible for Jobsite Safety (cont)

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- The court found:
  - "[N]one of the safety provisions in the CM contract here impose upon Hunt any specific legal duty or responsibility for the safety of all employees at the construction site"
- In fact, the contract supports the opposite conclusion according to the court
  - "Hunt's contract expressly states that its CM services are to be 'rendered solely for the benefit of [the client] and not for the benefit of the Contractors, the Architect or other parties performing Work or services with respect to the Project.' Moreover, the contract provided that Hunt was not 'assuming the safety obligations and responsibilities of individual contractors,' and that Hunt was not to have 'control over or charge of or be responsible for … safety precautions and programs in connection with the Work of each of the Contractors, since these are the Contractor's responsibilities.' … In short, Hunt did not undertake in its contract a duty to act as the insurer of safety for everyone on the project. Rather, Hunt's responsibilities were owed only to [the Client], not to workers…."

CM Not Responsible for Jobsite Safety (cont)

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- The court was critical of what it called the plaintiff's "all-or-nothing" proposition that by virtue of agreeing to certain safety items in its contract with the owner, the CM had become responsible for all jobsite safety – including that which pertained to employees of contractors

- If that argument were accepted, said court, and CM's were made liable in situations like this one, it would be bad for jobsite safety

CM Not Responsible for Jobsite Safety (cont)

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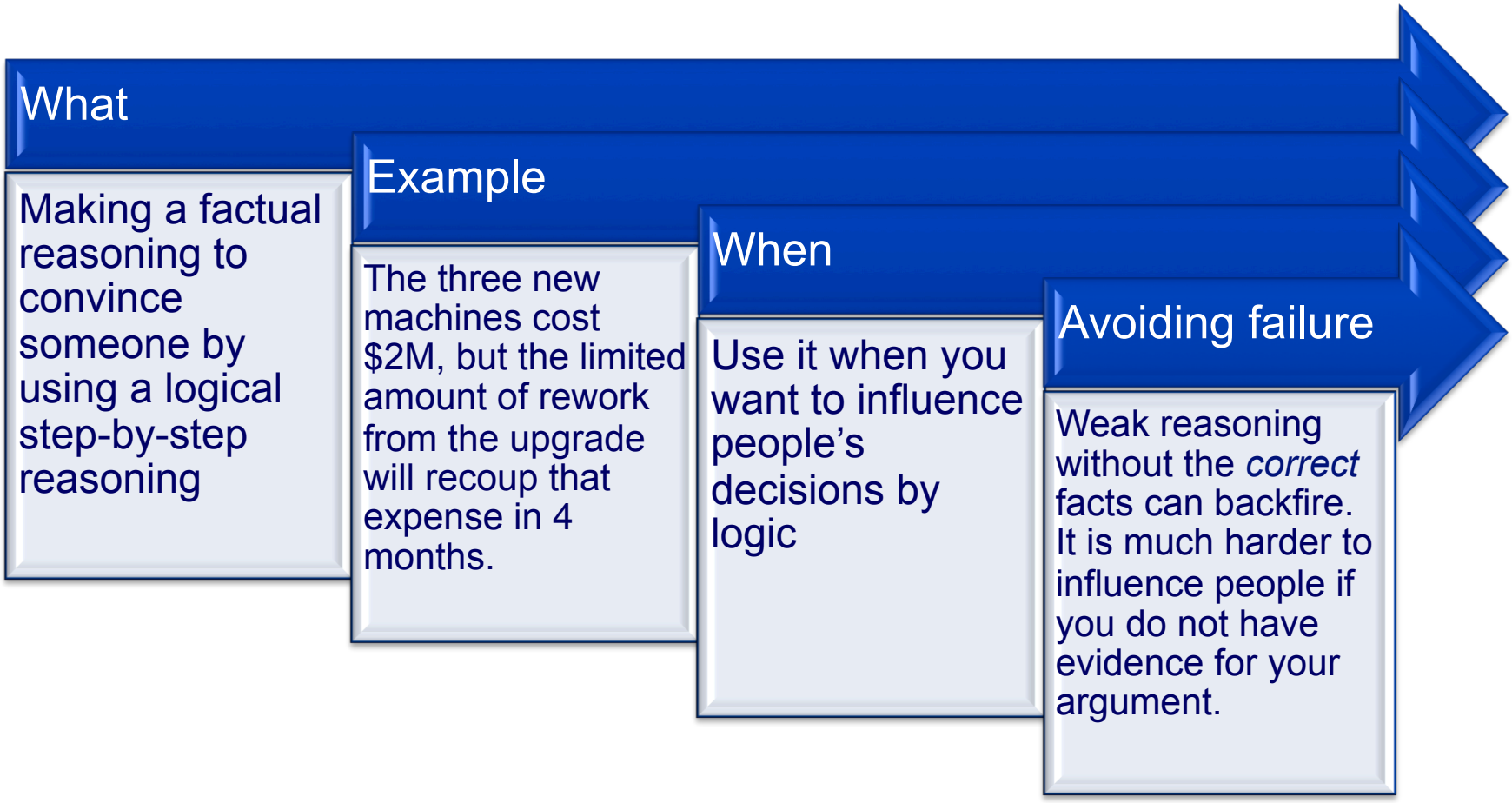
- As explained by the court:
  - "[S]afety at construction sites, especially at large public-works projects like this one, should not be sacrificed for fear of exposure to liability. The contract at issue here reflects a way of promoting safety without exposing construction managers to suits like this one….
  - "[T]he position advanced by [claimant] would 'make it virtually impossible for a contractor taking on the role of construction manager to limit its liability so as not to become an insurer of safety for workers of other contractors.'"

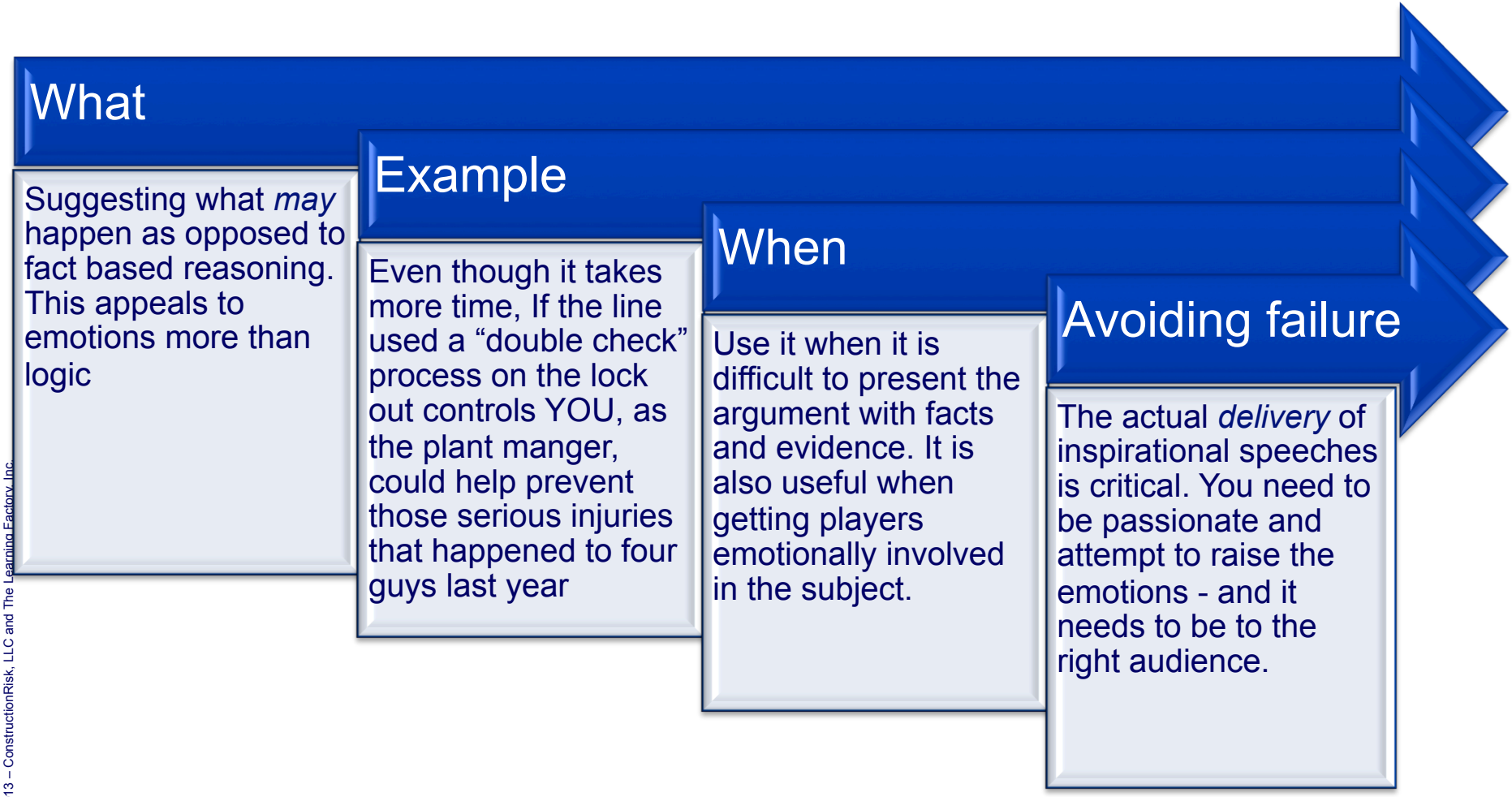
CM Not Responsible for Jobsite Safety (cont)

- In this case, even though the CM participated in site safety meetings and issued site safety reports and did other safety-related activities, the court found that all of these were within the scope of the contractually-agreed upon services that performed strictly for the benefit of the owner-client and not for the benefit of employees of any of the contractors
  - This seems to be the key in many of these decisions – which the contract and actions in the field demonstrate that the CM was only serving the interests of its client and not anyone else

Logic



Inspiration



Participative Way

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- I know production is critical at the end of the month, can you think of a way to meet quota without bypassing the guards during ramp up?

Non-participative way

- **I'm tired of telling you this every time there is a production surge, you cannot bypass the guards**

General Contractors

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Contractor Responsibility

- The GC on a project is typically responsible for overall site safety because the contractor is performing the type of work that is creating the most significant safety risks on a site

- The Agreement between the contractor and the owner specifically assigns this responsibility to the contractor as an independent contractor responsible for its own means, methods and procedures — including safety precautions

- See for example, American Institute of AIA A 201-2007, section 10, and ConsensusDOCS 200 – 2007, Section 3.11

Contractor Responsibility
AIA A201 – 2007

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- § 3.3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures…."

Contractor Responsibility
Comment on 3.3.1 – Safety Issues

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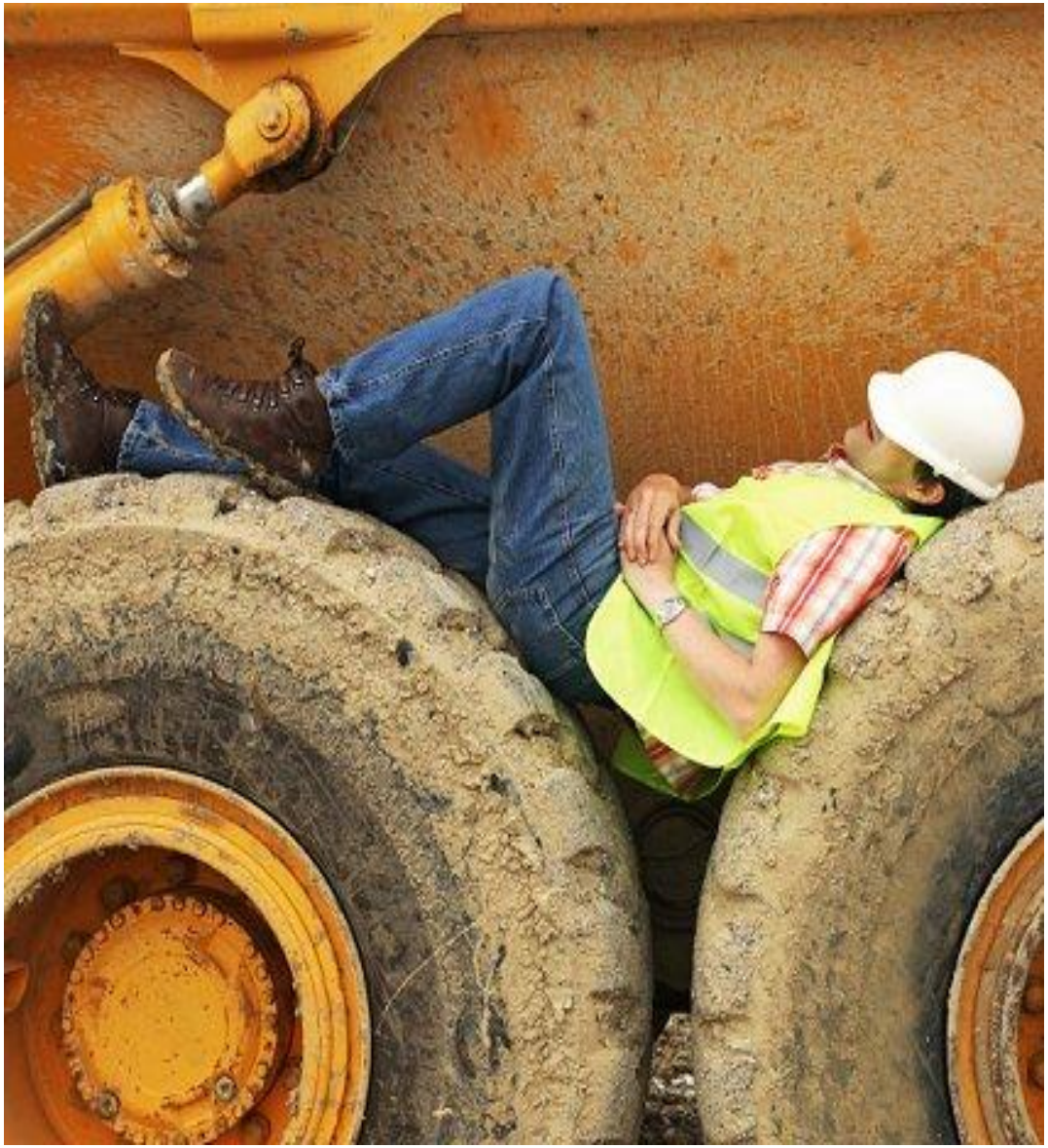
- Allows owner or architect to instruct Kr on how work is to be performed – places affirmative duty on Kr to (1) evaluate the Owner/Architect (O/A) directives to determine if there are safety concerns, (2) notify O/A of the same and (3) develop safe means, methods or suggest changes to instructions to make them safe

- If Kr proceeds without objection it assumes responsibility for safe performance of the instructed work

- If Kr notifies O/A of safety concerns and is instructed to proceed anyway without changes, the Owner becomes “solely” responsible



Contractor Responsibility

- In addition to being liable for acts that cause injuries, the contractor may in some instances also have liability for the injuries of its subcontractor's employees.
  - This can be so even when those injuries are not directly caused by the prime contractor

- Courts in some states impose liability on contractors for hazards where the contractor knows or should know the employee of a subcontractor is not protecting himself against a known hazard. Some states find contractors liable for injuries to subcontractor employees if the contractor has retained control over the subcontractor's means, methods and procedures – especially if the prime contractor maintains safety-related supervisory duties such as providing a safety supervisor, or ensures compliance with safety rules and regulations.

Contractor Responsibility

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- Some courts find GC liability by focusing the legal analysis primarily on the language of the contract between the project owner and contractor that includes specific and detailed safety responsibilities being imposed upon the GC for both it and its subcontractors
  - *Cochran v. Gehrke, Inc., 305 F. Supp. 2d 1045 (N.D. Iowa 2004).*
- Other courts hold that just because contract gives GC authority to direct, control or supervise the work (including Sub's work) that created the injury is not sufficient basis to find the prime contractor liable for subcontractor injuries - provided the GC didn't exercise actual control over its Sub's work
  - "In the absence of proof of any negligence or actual supervision of a subcontractor, the mere authority GC has to supervise the work and implement safety procedures is not a sufficient basis to impose liability or to find that GC owes any common law indemnification to the project owner for damages"

GC Liable for Injury to Independent Kr's Employee

- GC had contract to remodel several floors of a hospital
- GC subcontracted glass-glazing work
- Employee of the sub was not wearing lifeline and fell to his death
- GC found liable to family of deceased
  - Court found GC:
    - Retained control of the fall protection measures
    - Job superintendent had responsibility to routinely inspect to see that subs were properly using fall protection equipment
    - Had actual knowledge that sub's employees not using protection
- Subcontract stated sub was responsible for safety of its employees.
- Prime contract said GC responsible for safety of its and sub employees

  - *Lee v. Harrison, (TX 2001).*

Contractor Not Responsible for Injuries Sustained by a Subcontractor's Employee

McCarthy Case Study

- In *McCarthy v. Turner Construction*, 953 N.E. 2d 794 (NY 2011), the court held the GC did not owe a duty to indemnify the project owner for the injuries sustained by a Sub's employee since the GC neither controller nor supervised the Sub's work

- The GC was performing a build-out for a store tenant (not the project owner); a employee of its Sub was injured by falling from a ladder
  - Employee sued the owner who then sued the GC for common law indemnification for damages the owner had been found vicariously liable for under the state's statutory law

McCarthy Case Study (cont)

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- Although the GC had not been found liable for the sub's employee injuries, the Owners argued they were entitled to common law indemnification
  - They asserted the GC contractually
    - assumed sole responsibility and control of the entire project,
    - and had the contractual authority to
      - (1) direct, supervise and control the means and methods of plaintiff's work; and
      - (2) institute safety precautions to protect the workers

- Owner asked the Court to adopt a general rule that:
  - A party may be liable for common law indemnification upon a showing that the party (i.e., the proposed indemnitor)
    - either was actually negligent *or*
    - had the authority to direct, control or supervise the injury-producing work even if it did not exercise that authority

McCarthy Case Study (cont)

- Owner was asking court to equate a party that merely has authority to direct, control or supervise the work with a party who is actively at fault in bringing about the injury suffered by the plaintiff

McCarthy Case Study (cont)

- Although the GC interacted with both the subcontractor and sub-subcontractor firm whose employee was injured, the court found the GC
  - had no supervisory authority over the sub-subcontractor's work, and
  - it provided no tools or ladders to subcontractors that worked at the site

- In *McCarthy v. Turner,* the Court found that:
  - The mere authority the GC has to supervise the work and implement safety procedures is not a sufficient basis to require common law indemnification of the project owner

  - Because the GC in this case "did not actually supervise and/or direct the injured plaintiff's work, [GC] is not required to indemnify the property owners under the common law"

GC: No Site Safety Liability Since Firm did Not Exercise its Retained Control Over the Jobsite to Such an Extent as to Affirmatively Contribute to the Injuries of a Subcontractor's Laborer

- Where a masonry subcontractor employee was injured by slipping on a plastering subcontractor's wet scaffolding, the laborer sued the project GC alleging his injuries were caused by the GC's negligence in sequencing and coordinating construction work at the site, and failing to call a "rain day" to protect workers from dangerous conditions caused by slippery surfaces

- Summary judgment was granted for the GC and affirmed on appeal, on the basis that the GC did not exercise control of the jobsite in a way that affirmatively contributed to the laborer's injuries

GC: No Site Safety Liability (cont)

- In this case, the laborer pled causes of action for negligence and premises liability. His negligence cause of action alleged, among other things, GC failed to coordinate and control the work being performed on the jobsite in a safe and proper manner, thereby creating a risk of injury to workers. He alleged he was forced to work in and around scaffolding that prevented and blocked his access to his work, causing him to fall. His premises liability claim was based on essentially the same facts.

GC: No Site Safety Liability (cont)

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- Although the evidence showed that the GC was responsible for coordinating and scheduling the work of subcontractors and had authority to direct that the scaffold be removed (and had even agreed that the scaffold could remain in the area where the laborer was working), this was not deemed sufficient by the court to raise an issue of triable fact as to whether the GC affirmatively contributed to the laborer's injuries.

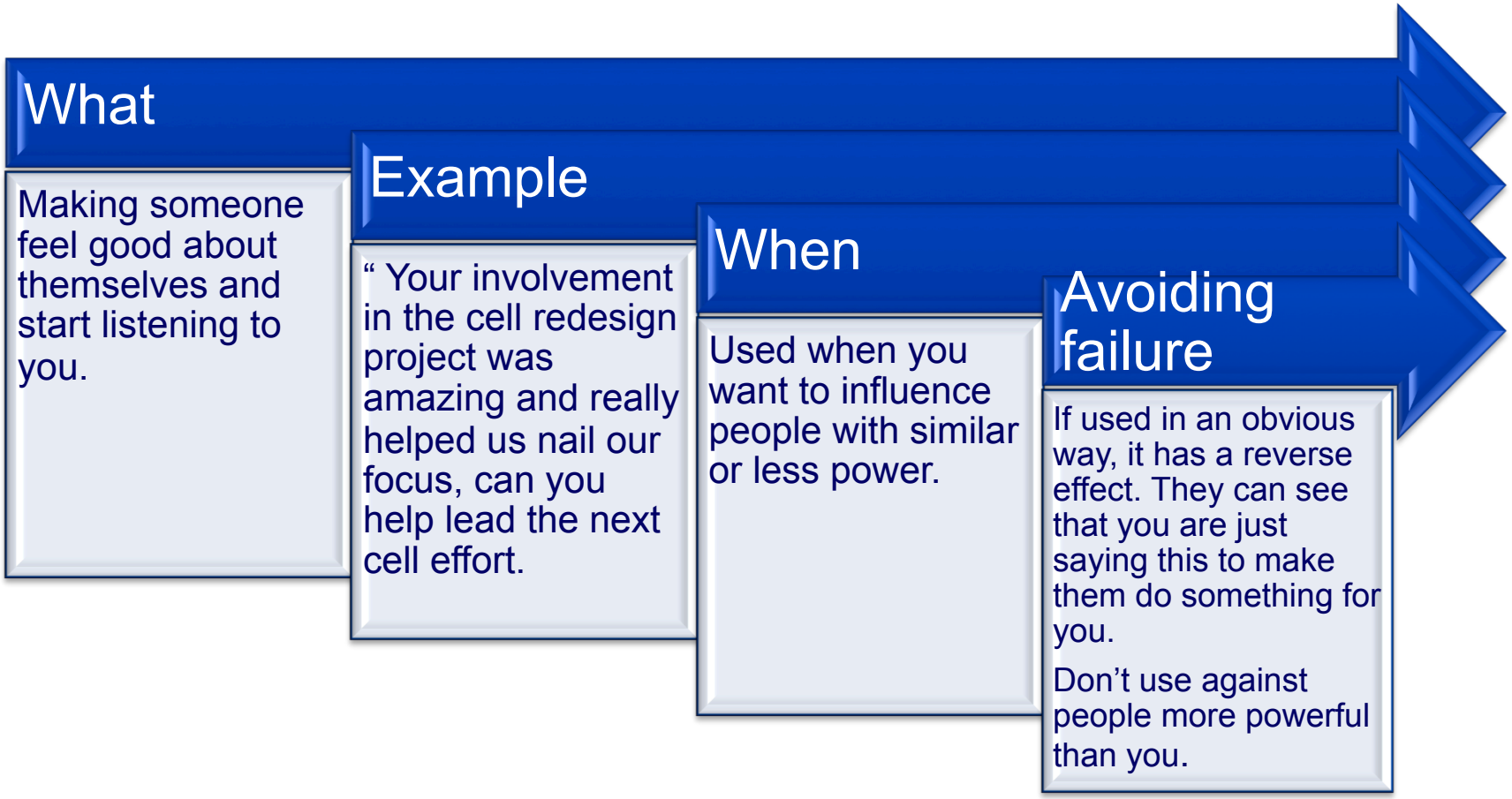
  – *Brannan v. Lathorp Construction*, 206 Cal. App.4th 1170 (2012).

GC Has No Duty to Warn Motorists of Unsafe Condition Where it Followed Design Specs

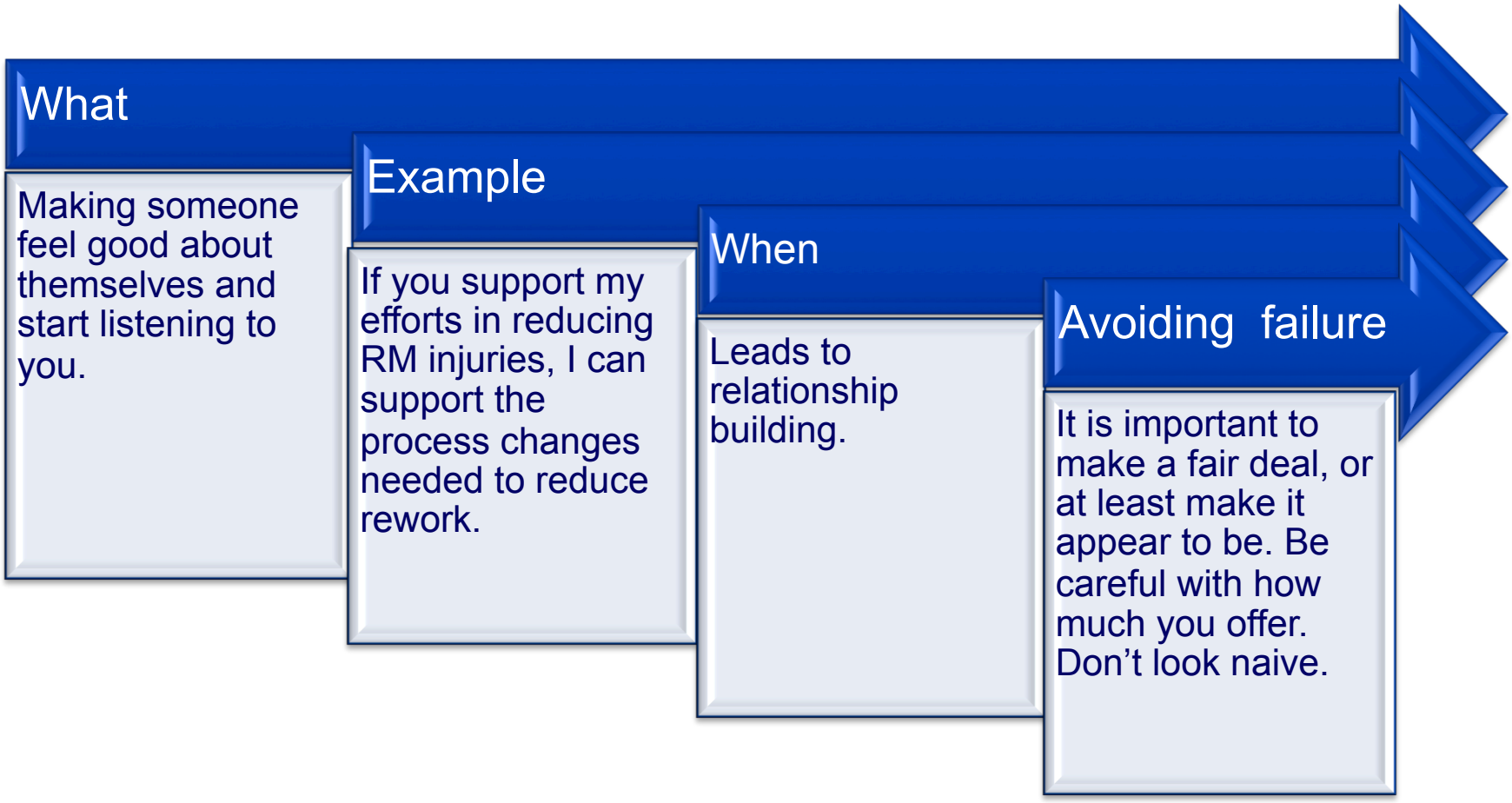
- Wrongful death action against GC where car slid into river from Hwy completed by GC seven months earlier
- Plaintiff argued 15 ft. gap between end of guard rail and bridge embankment was unsafe and Kr owed duty to rectify condition and warn prospective motorists about it
- Court held: No duty owed by GC to rectify condition since it was contractually required to adhere strictly to plans and specs – which it did – with approval by engineer and owner
- Court held: No duty to warn since it didn't own the property and was not in position to erect permanent signs or other devices to warn public of the gap

  – *Allen Keller Co. v. Foreman*, 343 S.W.3d 420 (Texas 2011).

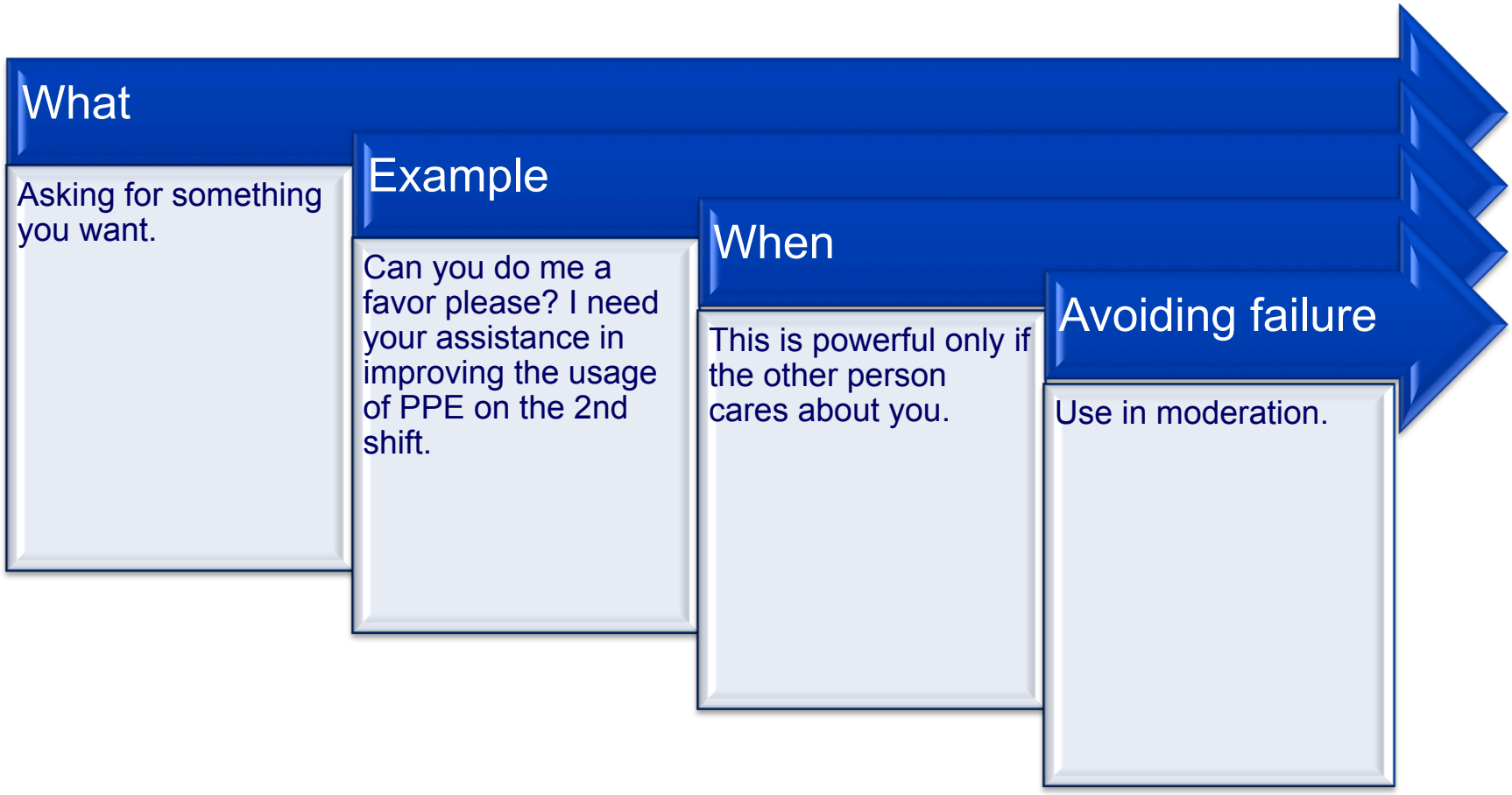
Uplift



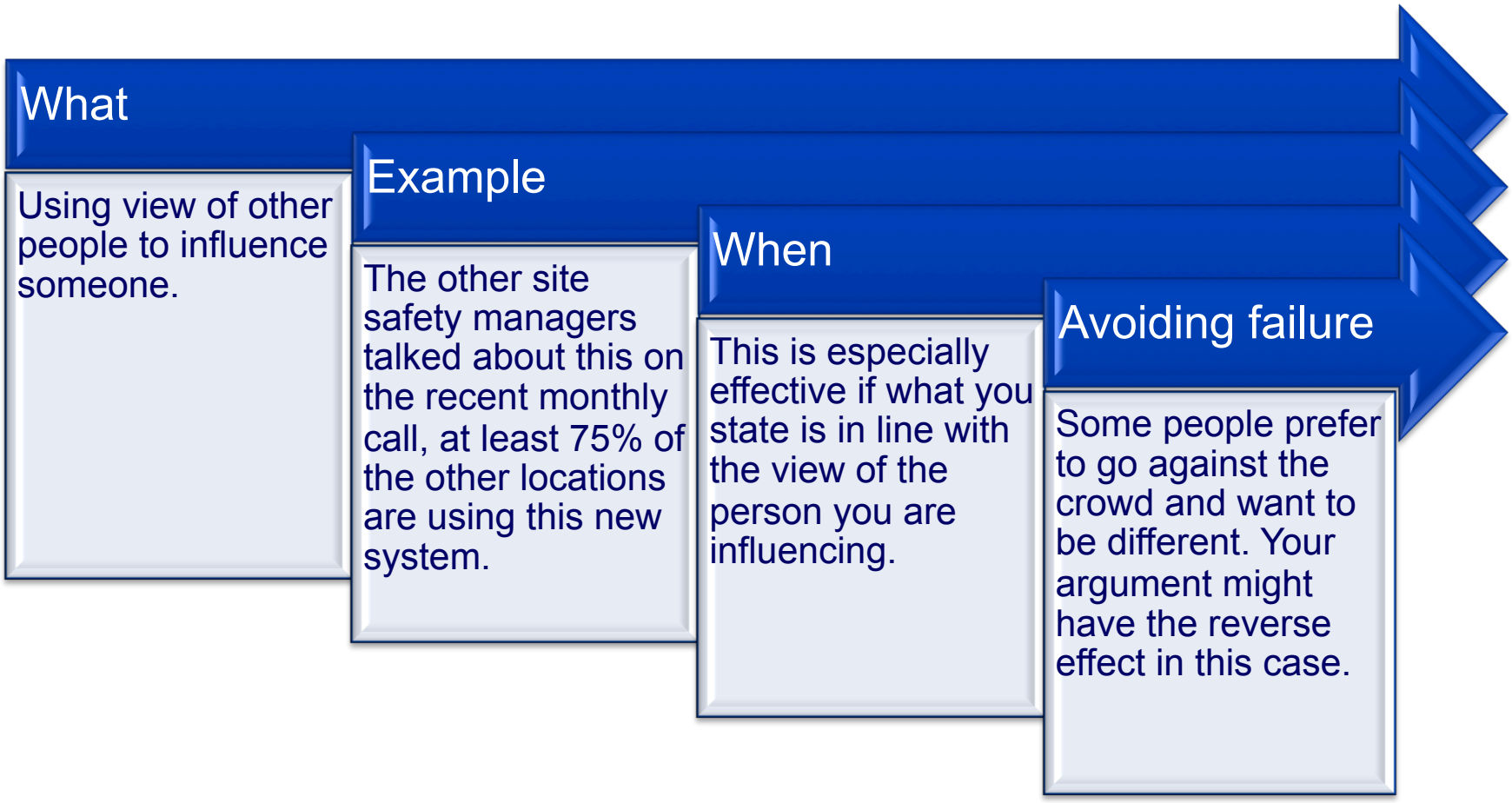
Deal



Favor



Collective



Workers' Compensation Bars Suit Against One's Own Employer

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Employee Injured in Trench Collapse Cannot Circumvent Worker's

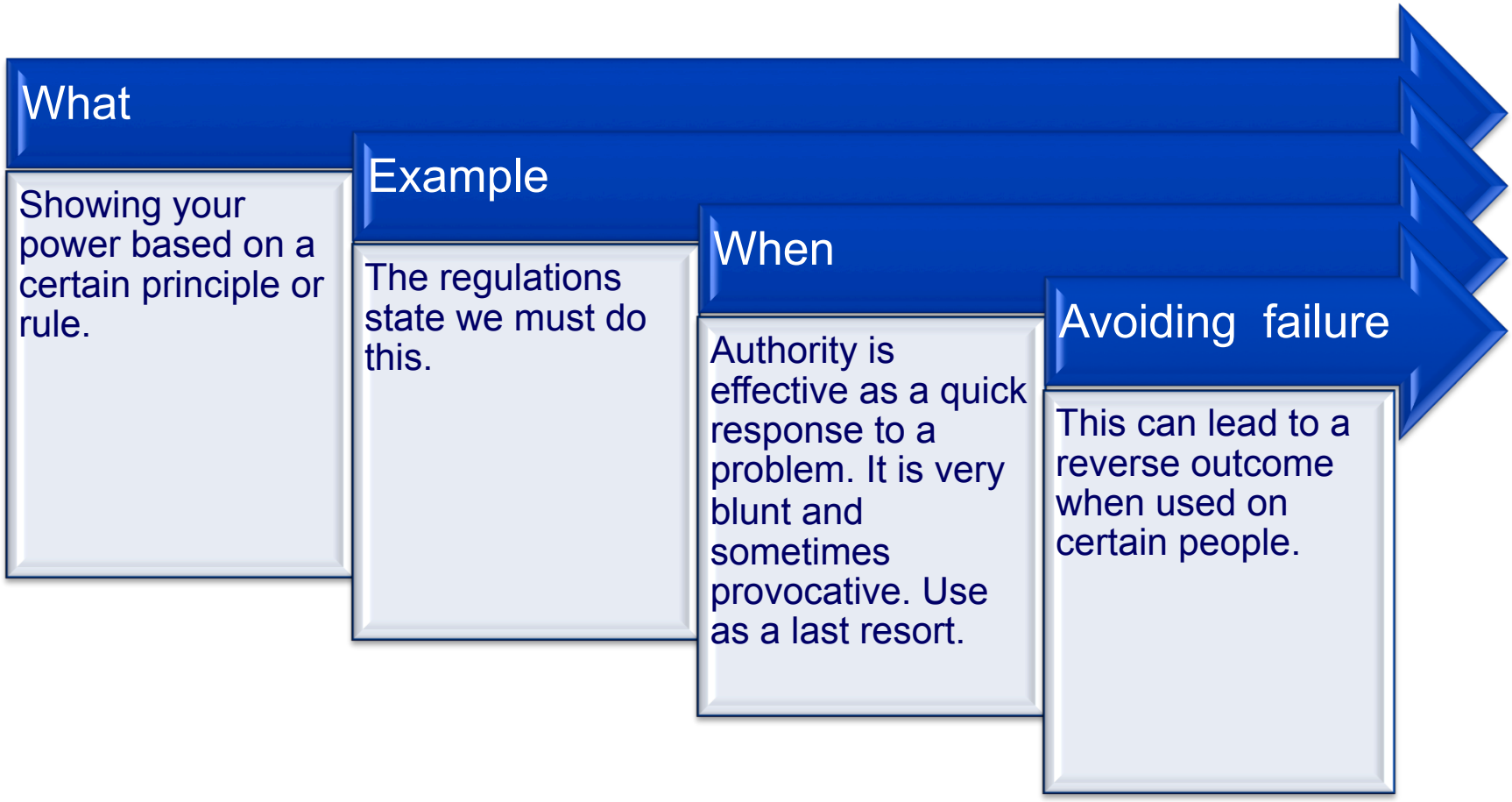
ZURICH

- Employee injured in collapse of unshored 25 ft. deep trench
- Sued employer arguing the "intentional wrong" exception to the Worker's Compensation bar on suits
- Court found the Kr acted with "poor judgment" and was an "exceptional" wrong – but not "intentional"
  - There must be a showing of actual intent to wrong and substantial certainty that the wrong would lead to injury or death to the employee
- Here OSHA did an investigation and found the "non-compliance was not an accident or negligence," but rather was a "willful violation" of the OSHA standards
- OSHA "willful violation" does not necessarily constitute a "willful violation" under Worker's Comp law.
  - *Van Dunk v. Reckson Associates, 45 A. 965 (NJ 2012).*

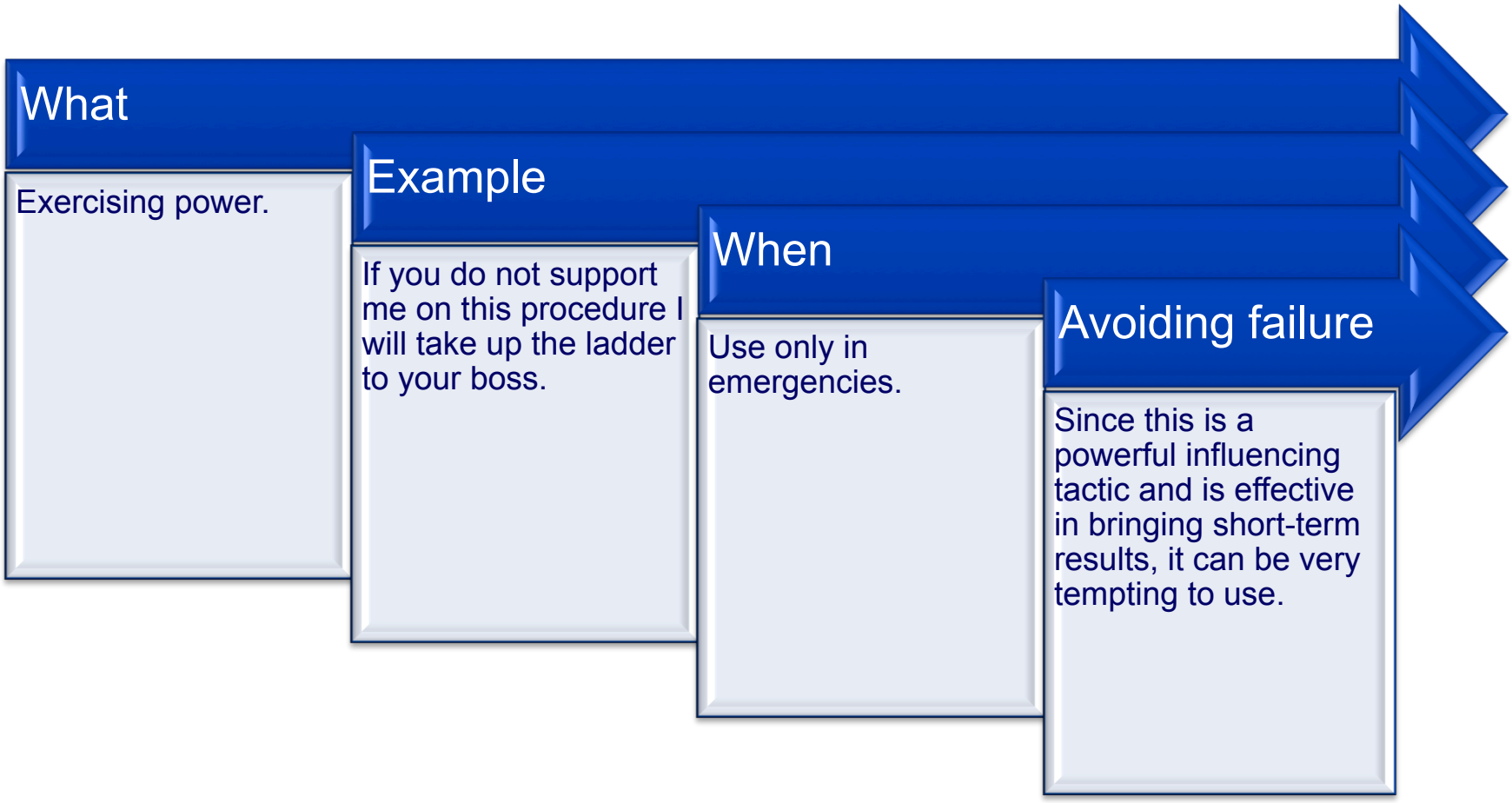
Trench Collapse (cont)

- Employee argued his employer (Kr) knew a trench collapse could happen, if he didn't know precisely when
- Court held against the laborer, explaining:
  - "Mere knowledge by an employer that a workplace is dangerous does not equate to an intentional wrong…. The existence of an uncontested finding of and OSHA violation in the wake of workplace injury does not establish the virtual certainty that case precedent demands. An intentional wrong must amount to a virtual certainty that bodily injury or death will result. A probability that such an injury or death 'could' result, is insufficient."

Policy



Force



Multi-Employer Worksite

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Multiple Employer Worksite Liability

- The Rule: OSHA may issue citations to a GC that had ability to control jobsite when subcontractor employees are injured even if GC did not create the unsafe condition and its own employees were not exposed to hazard
- Example case:
  - Summit Contractors was GC on college dorm project. It had only 4 employees on project, including the project superintendent and three assistants
    - Exterior brick masonry work was subcontracted out
    - Employees of brick mason worked on scaffolds without fall protection
    - Prime observed this and repeatedly told sub to correct the problem
- RESULT?

Multiple Employer Worksite Liability (cont)

- GC cited by OSHA based on controlling employer liability.
- Fed. Circuit court affirmed GC liability based on the language of 29 CFR section 1010.12(a):
  - "Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph"
  - Court found a duty to protect not only the employees, but also a duty to "places of employment"
- GC is particularly vulnerable to liability if it has supervisory control over the worksite, such as contractual responsibility to the project owner for all site safety, or authority to require subcontractors to make corrections

Framing Sub Not Liable Under Multi-ER Worksite Doctrine When EE Intentionally Assumed Risk by Its Actions

- EE of HVAC sub fell to his death through open stairwell
- Framing SubKr had completed framing three weeks earlier and left unprotected hole in floors
- Framing SubKr not on jobsite when accident occurred
- HVAC Sub's EE let himself into house and placed ladders into openings to he could move between floors
  - His makeshift ladder fell when he became impatient waiting for another EE to move it – and he decided to pull it up and move it himself
- Court held: Framing sub did not control jobsite conditions and work at time of accident and owed no duty pursuant to multi-ER worksite doctrine of OSHA
  - *C&M Builders v. Strub*, 420 Md. 268 (2011)

Conclusion

- Contractual relationships between the various project members, including prime contractors, subcontractors, construction managers, and professional consultants can allocate or even shift primary responsibility from one party to another

- Through statutory laws and regulations, as well as common law tort (negligence) principles, a party may be subject to certain responsibilities and liabilities regardless of how creative they have been in their contract language

- Based on a party's actions in the field, a party may subject itself to site safety responsibility despite contract language stating that it has no responsibility

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Disclaimer

This information is not legal advice and cannot be relied upon as such. Any suggested changes in wording of contract clauses, and any other information provided herein is for general educational purposes to assist in identifying potential issues concerning the insurability of certain identified risks that may result from the allocation of risks under the contractual agreement and to identify potential contract language that could minimize overall risk. Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting final contract language. This is not intended to provide an exhaustive review of risk and insurance issues, and does not in any way affect, change or alter the coverage provided under any insurance policy.